BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

This petition of A. L. Shushan for a writ of certiorari presents a case of where a circuit court of appeals has so far sanctioned the departure of a court trial from the accepted and usual course of judicial proceedings, as to call for the exercise of this Honorable Court's power of supervision. We contend that the application of the Mail Fraud Statute to the relations (in 1936 and 1937) between Newman, Harris & Company and the Orleans Levee Board was, legally, a distortion of the meaning and purposes of that statute. We say, and will endeavor to point out, that the Circuit Court of Appeals for the Fifth Circuit has recognized this in principle in its opinion, but has mistakenly failed to give it effect in the court's judgment.

The test of the whole matter is that Newman, Harris & Company, a reputable investment banking house at New Orleans, made a contract to do certain things for the Orleans Levee Board at their own risk and expense, their compensation to be wholly contingent upon their reducing the bonded indebtedness of the board, and to be a percentage of such savings, if any, thus effected. There is no question in the case that the work was done, and a savings to the board was effected.

It afterwards developed that there was in the case the element of an alleged "bribery" of one defendant by another defendant. All parties testified, and the record is otherwise persuasive, that neither Newman, Harris, or present petitioner Shushan were aware of the payment claimed to have been "bribery".

But whether they were or not, as a legal proposition

the "bribery" of board member Waguespack was remote from the claimed fraudulent obtaining alleged to have violated the sanctity of the mails. This was an obtaining only of payment for an admittedly performed work.

Assuming that board member Waguespack was "bribed" in connection with the awarding of the contract, there had intervened, before any payment was made, the faithful performance of the work.

To try to circumvent this dis-connection of the "bribery" from the "payment", by the intervening element of faithful performance of the task, the prosecution fabricated a contention that the collection of the compensation had been an obtaining under the mail fraud statute by false pretenses, representations and promises, because Newman, Harris & Company had not discounted interest savings then actually arranged by Newman, Harris & Company, but which arrangement served to retire interest obligations which otherwise would have been payable by the levee district in future years. As against the straight arithmetical calculation of the existing difference in amount between one bonded indebtedness and another, commonly used in the municipal bond business, the prosecution conjured up a vague idea of discounting the earnings of future years, absent any such agreement between the parties, or any recognized custom of the trade to do so, or even any known discount rate which could be resorted to as a means of determining current value of such previously existing future obligations.

This necessarily became the main reliance of the prosecution to assemble all the essential ingredients of a mail fraud case. The "bribery" of Waguespack alone, even if it had been the moving force in the getting of the contract, could not have been the basis of a mail

fraud charge. It would be merely a State crime. *Fasulo v. U. S.*, 272 U. S. 620; *U. S. v. Smith*, 29 Fed. (2d) 926.

So the prosecution trumped up this contention of a fraudulent obtaining of payment, by non-use of the discount method. By this fanciful addition, they dressed up a state "bribery" into mail fraud, just as government attorneys had tried unsuccessfully to dress up the State crimes of extortion and embezzlement into mail fraud in the *Fasulo* and *Smith* cases, above cited, respectively.

Defense counsel did their best to get the judges of the district and appellate courts to see that this "discount theory" element the prosecution had purposely created out of thin air had been a shrewd subterfuge, to get around the doctrine of the *Fasulo* and *Smith* cases that the perpetration of a crime against the laws of a State, such as bribery, in addition to the established examples of extortion and embezzlement, does not of itself create a mail fraud case, even where use of the mails may bear some relation.

If the money or property obtained is a *quid pro quo* for services rendered, we say the fact that even bribery may have been resorted to, **in order to procure the opportunity to fairly do** the work, does not make the obtaining of the compensation for the work done in any sense fraudulent within the meaning of the mail fraud statute.

We had every reason to believe that the appellate judges would realize that the "discount theory" created by the prosecution had no place whatever in a criminal case, and that in holding it had no place in a criminal case, they would discard it, and would then see that, as in the *Fasulo* and *Smith* cases, the federal district attorney was pitching his case entirely on the alleged commission of a State crime. The court of appeals did discard the "discount theory", to the extent that after a full

review of the case they said at the close of their opinion that they "should hesitate to rest a criminal conviction for fraud on it alone" (Tr. Vol. VIII, page 4822). Then, having read the "discount theory" out of the case, in effect, as a basis for a charge of criminal fraud, they went on to say that taking it in connection with the "bribery" of Waguespack, they thought it was a jury question whether mail fraud was committed.

We respectfully submit, on the contrary, that whether, with or without the discarded "discount theory", the State crime of bribery could create a federal mail fraud offense where the money was paid for work performed, was and is a question of law, and should have been decided as a question of law, and in petitioner's favor, under his demurrer, and under his motion for a directed verdict, by the court of appeals; and the responsibility for determining what could or what could not constitute mail fraud within such narrow bounds of determination should not be left to legally unschooled jurors, who are apt to decide anything which for any reason looks wrong to them is mail fraud on general principles.

If the "bribery" of Waguespack, like the "embezzlement" of the sewing-machine agent in the *Smith* case, or the "extortion" by *Fasulo* in the case this Court recently dismissed, could not make a case of mail fraud, and the "discount theory" of wrongful obtaining was unacceptable, then the two negative precedents could not unite to make an affirmative consequent. If the compensation obtained by Newman, Harris & Company without "discount" was fraudulent *per se*, it would not need the "bribery" of Waguespack to make it a fraud. If it was not fraudulent of itself, and the Court of Appeals has so found, or it would not have "hesitated" to affirm the conviction therefor, then the disconnected and unre-

lated "bribery" of Waguespack could not make it an obtaining by fraud.

Error throughout the case, from the day the trial judge overruled the demurrer, to the date of the appellate court's opinion, has persisted through this abortive merging of the alleged bribery of Waguespack to procure opportunity to do certain work and the fantastic claim of a non-discount collection for the work. Whether either element, or both, could create mail fraud was and is a question of law which the trial judge and the appellate court should not have left to the jury, and the action of the Court of Appeals for the Fifth Circuit in doing so, inconsistently with the *Smith* and *Fasulo* cases, cited, should be reviewed.

In justice to our client, Shushan, we would briefly add that what we have already said assumes, for argument's sake, some connection on his part with the elements of the case discussed. As a matter of fact, however, **all** the testimony in the case shows that he had nothing to do with and actually no knowledge of either the payment made by Miller to Waguespack or the method of the computation of the levee board fee by Newman, Harris & Company. It is unfortunate enough that the government's legal theory on which conviction was obtained, as we have tried in these pages to show, was not a sufficient mail fraud cause; it is more unfortunate for Shushan that he was convicted in spite of the fact that he had no complicity in the two elements of the matter erroneously established by the government as its basis of a mail fraud action. Why this conviction of Shushan was nevertheless accomplished before a jury of twelve citizens presumed to ordinarily be fair and just to an accused, will appear from the following pages of this brief.

As we have said, Shushan had nothing to do with, nor even knowledge of, the payment by defendant Miller to defendant Waguespack. The circumstances of that payment, alleged by the government to have been "bribery", will be best explained in the petition and brief for a certiorari by those defendants. Likewise, the conduct of their refunding operations and the method of the computation of the fee therefor in accordance with the custom of the municipal bond trade, with none of which Shushan had the slightest to do, will be best described in the petition and brief for a certiorari by the defendants Newman and Harris. Without repetition, and unnecessary prolongation of this argument, we adopt by reference such further contentions of error as are advanced in the petitions and briefs to be filed by the four co-defendants.

POINT NO. 2: WANT OF DUE PROCESS

As your Honors may have already surmised, in a case, which on its most favorable aspect to the prosecution was so near the border line of debatable criminal fraud, there must have been some motive to impel its unusually hurried and vigorous prosecution, beyond the ordinary diligence of a district attorney's office. Where other motives than the impartial administration of criminal justice enter into such proceedings, it becomes but a short step to lack of due process. Where a showing of lack of due process is reasonably suggested by the application for certiorari, the writ should be granted and the validity of the conviction carefully scrutinized.

We have already said in our preceding petition that, due to the conduct of the special prosecutor sent down to Louisiana from Washington, D. C., Shushan's trial was held under conditions approaching the famous propa-

ganda trials of Soviet Russia. The court of appeals has agreed with us far enough to say in its opinion:

"We think that the prosecuting attorney's encouragement of the newspaper publicity about the case was ill-judged, and improper." (Tr. Vol. VIII, page 4808).

We differ with the opinion of the court of appeals only on the legal effect of this improper conduct of Mr. Rogge. The court of appeals affirmed the conviction despite Mr. Rogge's tactics; we say those tactics deprived petitioner Shushan of due process in his trial and, in fact, were solely and directly responsible for a conviction of what was a doubtful case at the best, a conviction which could not have been fairly obtained under ordinary conditions.

To correctly understand the effect of the special prosecutor's conduct on the outcome of this trial, it is necessary to take a bird's-eye view of the chronology of the events involved.

A. L. Shushan was president of the Board of Commissioners of the Orleans Levee District (commonly known as Orleans Levee Board) from 1928 to 1935.

This was a board composed of seven members, serving without pay, five (including Shushan) appointed by the governor, the others being ex officio the Mayor and the Public Property Commissioner of the City of New Orleans.

Shushan's incumbency was during the political regime of Huey P. Long in Louisiana. He was known as a very prominent Long adherent, and he was liked or disliked accordingly as the individual's political bias was for or against Huey Long.

The faction's leader was assassinated in September,

1935. The following month the government conducted a bitter trial of Shushan for alleged income tax evasion. The jury acquitted Shushan, to the disappointment of political opponents, chief among whom were the New Orleans newspapers.

Following his acquittal, Shushan resigned, on October 26th, 1935, from the Orleans Levee Board. He was friendly with the succeeding governor, Richard W. Leche (1936-1939) but held no office under him.

Between July, 1936, and October, 1937, during the first two years of the Leche administration, and when Shushan was no longer connected with the Orleans Levee Board, occurred the series of bond refunding transactions by that board through the banking investment house of Newman, Harris & Company. These transactions are what the prosecution interprets as "mail fraud" in this case, but which the defendants say was an honest and able reorganization of the board's financial structure which immediately improved its position by $2,000,000.00.

These bond refundings were completed by the end of 1937, and for more than a year and a half there was no criticism of them.

In the early summer of 1939 President James M. Smith of Louisiana State University fled from financial shortages and other scandals to Canada, and shortly afterwards Governor Leche resigned. Lieutenant-governor Earl K. Long, younger brother of the deceased Huey Long, succeeded Leche as governor, and almost immediately launched a campaign to be nominated to succeed himself in the Democratic primary to be held January 16th, 1940.

Foes of the Long faction rallied to vigorously oppose Earl Long, and part of their strategy was to send to

Washington for a powerful political ally in the person of a representative of the United States Department of Justice. To this task was assigned Assistant Attorney-General O. John Rogge, heading a large corps of assistants and investigators, who entered Louisiana about June of 1939 to a great fanfare of political newspaper publicity.

Under color of prosecuting "federal offenses", Rogge and his aides openly allied themselves with the local political leaders on one side of the Louisiana primary fight, and proceeded to use all of the tremendous resources of his high federal position to collect and furnish to the anti-Long newspapers material for a deluge of campaign publicity. He used the federal grand jury room as a sounding-board for the daily blasts of the local press. As he recently told a Chicago luncheon club, he wrote his "mail-fraud" indictments so as to always include a few paragraphs for the benefit of the advance publicity on the trial. He took advantage of the unlimited amount of news print available to him to propagandize the guilt of his defendants first, and then put them before a jury panel already saturated with the prejudice of such propaganda.

Among the political victims of this system who were early selected for "purging" was the defendant Shushan. His participation with Newman, Harris & Company in the underwriting of the levee board's bond refunding transactions was known to Rogge, because as far back as March, 1938, over a year before, Shushan had returned to the federal government for tax on his earnings in the venture.

Rogge also knew what we proved Shushan then did not know, that Waguespack, a member of the board, had received from another defendant (Miller), a portion of

Miller's earnings in the Newman, Harris & Company work for the board, because in March, 1938, Waguespack and Miller had reported tax accordingly to the government.

With this claimed "bribery" of Board Member Waguespack, only a State offense, to work from, Rogge and his allies, the New Orleans newspapers, set out deliberately to "get" Shushan.

On the morning of July 22nd, 1939, before anything had been announced regarding an investigation of the Newman-Harris contract, the New Orleans Times-Picayune printed a cartoon of a buzzard marked "financial advice", an obvious reference to that contract. Rogge said afterwards the matter had been under investigation a month. Who tipped the cartoonist off can be readily surmised.

From that time on, the allied Rogge-newspaper assault on Shushan was continuous and unrelenting, even until after his trial began.

There was not a trick known to journalism to which these newspapers did not resort in bringing about, first the indictment, and afterwards the conviction, of Shushan. The deadly weapon of ridicule was used in the daily cartoons, often identifying him by name, and always striking at the things which the public were educated otherwise to connect him with. He was assailed in editorial after editorial, directly or indirectly. He was attacked by the publication of letters from partisan patrons of these newspapers. Shrewd appeals to prejudice were made frequently printing large photographs of what was constantly termed his "mansion on the Gold Coast of St. Tammany Parish"; and by giving sensational publicity to orders of the Levee Board to remove his

name from the local airport; and to vicious and unfounded innuendoes that his previous acquittal of the income tax charge in 1935 **had been accomplished through his bribery of the jury.**

It was in this last mentioned phase of the newspaper campaign that the Assistant Attorney General in charge of the case cooperated mostly effectively. This attack on the previous Shushan jury was made in the month of August, 1939, and was no doubt calculated to have a double effect. Mr. Rogge's first mail fraud case, the Bienville Hotel case, was to be tried in September, and the Shushan case was to be tried in December. By having it generally known that the federal grand jury at New Orleans was engaged in an investigation of so-called jury tampering in the 1935 case, prospective 1939 jurors would be discouraged from any leadings toward the defense in the mail fraud cases about to be tried, lest **they** hereafter might be suspected of and investigated for having succumbed to some improper influence. In other words, since no citizen relishes the idea of having government policemen and federal grand juries probing his conduct or habits, plenty of publicity about this kind of an investigation **ahead of the 1939 mail fraud trials** was bound to make future jurors cautious about taking any stand for a defendant under existing pressure against such defendants. Secondly, such publicity would build up a background of thought in the public mind that Shushan had cheated justice once before, rather than been fairly acquitted, and would make it more difficult for him to obtain acquittal a second time.

But it was only out of the federal grand jury room that such an attack could originate with safety. Neither Mr. Rogge nor the newspapers had, or ever have had, any proof that anybody on the Shushan jury of 1935 was bribed in connection with the verdict in that case. For

the newspapers to initiate such a baseless accusation would not only have sounded hollow, but it might have exposed them to the libel laws. Ordinarily, if such a matter was investigated in a grand jury room, the ban of secrecy would have been enforced to protect any person unjustly accused or investigated, since grand jury proceedings are privileged, and redress is impossible where any harm is caused an individual, by circulation of such reports.

But the rights of an individual against undeserved reflection upon his character or acts, and the ban of secrecy on grand jury proceedings, meant nothing to the New Orleans newspapers in the Shushan case. The fact that the federal grand jury was investigating what was termed "jury tampering" in the previous Shushan case was freely announced from day to day in the columns in these New Orleans newspapers, which credited Mr. Rogge with divulging to them such information. In this manner the suspicion was indelibly stamped on the public mind that Shushan had escaped justice in 1935 by corrupting his jurors, and when nothing conclusive to this effect ever emerged from the grand jury room, by way of indictment, the newspapers just quietly dropped the subject, and there was nothing Shushan could do to counteract the rumor thus so effectively set in circulation in the district wherein he had to stand trial.

This "jury tampering" story was only one device resorted to by the newspapers for the purpose of discrediting Shushan. To reprint, or even discuss, everything prejudicial which was hurled at him for five long months, would make this brief more lengthy than the transcript already is.

In support of our contention that Shushan did not receive due process of law, in the practical meaning of

that legal term, we review to your Honors the following high-lights of the publicity campaign against him, every one of which will be borne out by the record and the physical exhibits filed in the case.

(a) The publicity campaign by the New Orleans newspapers to get Shushan indicted and convicted began on July 22, 1939, a month before his indictment, and over four months before his trial.

(b) It was no temporary sortie, but on the contrary was pressed relentlessly for 154 days without any let-up until the verdict of guilty was in.

(c) Its chief motive was to make Shushan, and the Levee Board bond refunding operation, symbolic of public corruption, and link them with the current political campaign to help swing the election of January 16, 1940.

(d) As part of the general political campaign, a special prosecutor, Mr. O. John Rogge, was brought to Louisiana, only for the duration of this political campaign, to handle the Shushan case, among various politically-connected matters.

(e) Special Prosecutor Rogge, certain political candidates and their managers, and the four New Orleans newspapers, all worked in close cooperation on publicity helpful to the newspapers' faction in the political campaign, including publicity relating to Shushan growing out of this case.

(f) The New Orleans newspapers were allowed to quote Special Prosecutor Rogge as to what was going on in the federal grand jury room in relation to Shushan, and thus with safety circulate unfounded and slanderous insinuations that Shushan had previously escaped conviction in an income tax case by "tampering" with the jury which had acquitted him.

(g) Special Prosecutor Rogge melodramatically posed prior to Shushan's trial for a photograph published by the newspapers showing him holding "symbolic bullets" sent him in a "threatening note", with mention over the picture of a warning "to drop his investigation of the Abe Shushan jury tampering case".

(h) In addition to such quoting of special Prosecutor Rogge, and his posing for such a photograph, all made use of as prejudicial publicity by the New Orleans newspapers against Shushan, for nearly five months those newspapers laid down a daily barrage of cartoons, editorials, pictures, letters from the public, and news articles calculated to inflame the public against Shushan and his case.

(i) This newspaper barrage was co-ordinated with political campaign speeches by numerous candidates and their orators, which became nightly programs on the stump and radio during December, the last month of the campaign and the month of the trial, and in which Shushan was continually held out to the public as guilty of the offense charged in the indictment.

(j) A so-called "convict parade" of a group of men in striped prison clothes, one of whom wore a sign marked "Shushan", was paraded around mass meetings all over the State by one of the candidates for the governorship, and this campaign stunt was publicized until it became a household word against Shushan throughout Louisiana.

(k) In a campaign headquarters of the same candidate for governor in New Orleans, not over four city blocks from the courtroom where Shushan was tried, in a large room visited by thousands of citizens, there hung a large canvas sign for several weeks before the trial showing a grotesque figure in convict stripes marked

"Shushan", which was represented to say: "I tried to fix de jury".

(l) The subsequently successful candidate for governor in the election which took place about three weeks after Shushan's trial ended, went about the State shortly before Shushan's trial calling the roll at political mass meetings of what he termed the "rogue's gallery", in which he specifically named Shushan, as was repeated in the newspapers.

(m) The subsequently successful candidate for attorney-general, in the same election, likewise went about the State shortly before Shushan's trial exhibiting at political mass meetings a large picture of Shushan's "mansion", usually referred to in the newspapers as being on the "Gold Coast", and once referred to by the Times-Picayune as his "big house", with quotation marks.

(n) After Shushan first applied for a continuance of his case until after the election, a New Orleans newspaper published an editorial comment that: "There is a movement now on foot, planned and executed by judicial stooges of the administration, to not bring to trial **all these culprits** who have been indicted **until after the election".**

(o) Although a delay in trial of only a few weeks, until after the election, would have relieved much of the fever-heat of the campaign, and its inevitable prejudice against Shushan, and the accused made an early and timely plea for such consideration, Special Prosecutor Rogge was insistent that the trial should be held during December, and it was hardly a coincidence that this was the wind-up month of the political campaign.

(p) Although Shushan's counsel appealed, in the

alternative, as early as November 7th, 1939, for protection of the accused by contempt action against the hostile newspapers, the trial judge refused to rule on that application for a whole month, **the month actually preceding the beginning of the trial,** during which the barrage of prejudicial publications continued.

(q) After the trial opened, the newspapers continued their attacks on Shushan, so unfairly in two instances, that the trial judge could no longer fail to act on the complaints of Shushan's counsel, and on December 7th, 1939, he ordered contempt proceedings instituted against two New Orleans newspapers; these actions being for only two mild instances, out of hundreds more aggravated, which had been going on for weeks, necessarily to the knowledge of the men later drawn on the jury panel; **but even in ordering the contempt actions for such obstruction of justice the trial judge declined to allow a mis-trial.**

The foregoing paragraphs (a) to (q) merely summarize the trend of the campaign of prejudicial publicity which was carried on from July 22nd, 1939, until December 22nd, 1939, the day the verdict of guilty was returned, or for exactly five months.

Petitioner Shushan did not sleep on his rights when the alliance between the New Orleans newspapers, the political candidates and spell-binders, and Assistant Attorney-general Rogge were making this mass assault on him.

The first indictment by the federal grand jury at New Orleans against Shushan, in connection with the Levee Board bond refunding operation, was returned on August 21, 1939, almost one month to the day after the Times-Picayune had first opened up on him with the

"financial advice" cartoon about the buzzards and the pelican.

A substituted indictment, which was for the purpose, we understood, of including additional mailing counts, was returned by the federal grand jury on October 17th, 1939.

The newspapers knew when Shushan was going to be tried by Rogge **before his own lawyers had any advices on the subject.** The date was set in the newspapers for December 4th, 1939, long before the substituted indictment.

Why the month of December was set by Rogge may be subject to other plausible explanations, but the fact remains that this was the time when a conviction would do the January election the most good, not too soon to be forgotten by the voters, not too late to have its effect at the polls.

The government's subsequently announced plan was to arraign defendants on November 7th, 1939, in order to get all preliminary pleadings out of the way by the proposed beginning of the trial on December 4th, 1939.

When the defendants appeared before the bar of Judge Borah's court on this first occasion on November 7th, 1939, counsel for the defense took immediate steps to oppose the trial until after the Democratic primary election, which was to take place on Tuesday, January 16th, 1940. These steps were taken immediately in order to avoid any argument afterwards that we had waited until the government had gone to great expense in summoning witnesses, etc., before we made our motion for a continuance.

The steps which we took on November 7th, 1939, were to file a petition on behalf of all five defendants

for contempt against the New Orleans Item and the New Orleans Tribune (see page 572 volume I of transcript), and another petition of all of the defendants for contempt against the Times-Picayune and The States (see page 578). These newspapers were coupled in this manner in the petitions because The Item and The Tribune are published by the same people, and the Times-Picayune and The States are published by the same people. The petitions speak for themselves, and there were attached to The Item petition some 34 clippings, which have been carried up in the original; while there were attached to the petition against the Times Picayune-States some 48 clippings, which have been carried up in the original, both in volume 23 of the bill of exceptions.

At the same time that we presented these joint petitions for contempt, each defendant filed a motion for a continuance of the trial until after "the conclusion of the current political campaign in Louisiana, and a reasonable time thereafter for the prejudicial heat and feeling thereof to pass away". The petition for a continuance of Shushan filed on November 7th, 1939, is found on page 584 of the transcript.

There was made part of this petition all of the four newspapers, the Times-Picayune, The States, The Item and The Item Tribune, and the publication of James H. Morrison, a candidate for governor, known as The Farmer's Friend, being all the issues of said newspapers since August 1, 1939, to date, and for the convenience of the court, Shushan also filed certain scrap books of the outstanding articles and cartoons clipped from other copies of the said newspapers to which the court might conveniently refer in considering the matter.

The various defendants also presented, as part of the petitions for a continuance, the affidavits of 113

citizens of the district averring that the defendants could not hope to obtain a fair trial until after the termination of the current political campaign (see Transcript, from page 767 to page 931, for these affidavits).

It seems to us most important to this case that over 100 citizens of the judicial district gave their sworn opinions to the trial judge that the temper of the public was such that the defendants could not hope to get a fair trial until the political campaign was over, and, although not a single affidavit or other form of proof was offered by the prosecution to contradict these citizens, most of whom were well-known men of substance and responsibility in the community, Judge Borah simply ignored these affidavits.

In fact, the New Orleans States that afternoon quoted Assistant Attorney-General Rogge as ridiculing Shushan's plea for a continuance, as follows:

> "These affidavits filed by the defense reminded me of a German election," declared the Assistant Federal Attorney-General in a modulated voice. "They went around among their friends. Why, this is a jury trial, not a plebiscite."

It is, of course, a natural and logical conclusion that one does not go to his enemies for advice of this kind. Assuming that 113 citizens of the judicial district were friendly to the defendants, does that of itself destroy their uncontradicted evidence of conditions existing in the district which they believed would temporarily make a fair trial impossible? Where the alternative is merely a matter of short delay, and the plea for that delay was timely made, was the trial judge justified in disregarding the opinion of 113 citizens, men moving in circles of life from which the jurors would come, on the sarcastic

opposition by the prosecutor about "a German election", and nothing else?

Usually when affidavits of this kind are tendered a judge in a judicial proceeding, and are accepted in the record, the method of opposition is to furnish proof to the contrary by counter-affidavits, not wave the matter aside as "a German election". No such contradictory proof was offered by the government, and when Judge Borah went ahead with the trial in the month of December, he did so in the face of the opinions of 113 citizens of the district that the trial, under political conditions then existing, could not be a fair trial.

At the session of the court on Monday, November 7th, 1939, at which the defendants' first petitions for a continuance until after the election were filed, and, in the alternative, for some form of contempt action to restrain the newspaper campaign of prejudice and invective, Judge Borah took no action whatever. He continued the arraignment and allowed the defendants ten days, or until November 17th, 1939, to file any further pleas.

The move for a continuance until after the election, and the prayer for contempt actions, **not acted on by the court,** seemed the signal for more vigorous attacks on Shushan and to discourage the trial's postponement.

On November 17th the defendants filed a lengthy **supplemental petition for contempt** proceedings against all four newspapers in one supplemental petition (see page 635 of Transcript). Attached to this supplemental petition were 58 clippings from various New Orleans newspapers (which have been carried up in the original, and are to be found in volume 23 of the bill of exceptions).

There was also filed on this date, November 17th, 1939, a **supplemental petition for a continuance** until after the election by each of the defendants (Transcript page 658).

Counsel for Shushan also filed with Judge Borah a carefully prepared typewritten brief of authorities on the court's power to act for contempt in such a situation, to which the prosecution never took the trouble to even reply, as far as we know.

On Wednesday, November 22nd, 1939, the defendants appeared before Judge Borah to argue the various pleadings which had been filed on November 17th. On this date the defendants filed a **second supplemental petition for contempt** referring to newspaper articles which had appeared in the five days since November 17th, 1939. These exhibits consisted of 26 clippings, which are to be found in volume 23 of the said bill of exceptions in the clerk's office of this Court.

On this occasion, November 22nd, 1939, counsel for Shushan asked the court for some action upon the petitions for contempt and the two supplemental petitions which had been present, asking that "steps be taken under authority of the court to protect these defendants from this kind of publicity". (Transcript, page 700). Judge Borah replied, "The court has not read the petitions as yet". (Transcript, page 700). Both original petitions for contempt **had then been before the court for 15 days.**

Counsel for Shushan asked the court if it would be possible to indicate to the defendants when some action may be taken by the court. Judge Borah answered with one word—"No". (Page 700 of Transcript). The court then proceeded with the argument of the various demurrers, pleas in abatement, etc.

At this time defense counsel filed in court an affidavit of James H. Morrison, candidate for governor and publisher of the vitriolic newspaper called the Farmers' Friend. This affidavit is found on page 931 of the transcript. With Mr. Morrison's affidavit we filed a large canvas sign which had been hanging for days in the large general room of the Morrison headquarters in the old Citizens Bank Building in Gravier Street between Camp and St. Charles, in New Orleans, about four blocks from the federal courthouse. This large canvas sign had been observed by thousands of people. It represented a line of convicts in stripes, with one marked "Shushan" saying: "I tried to fix de jury".

This was a direct echo of the Rogge campaign of circulation of information from the grand jury room that "jury tampering" in the 1935 Shushan case was being investigated.

The sign's presence in the Morrison headquarters in the business district of New Orleans, depicting Shushan in convict stripes, was a matter of general knowledge in the community in the weeks **immediately before his trial started.**

We also offered in evidence a photograph of the Morrison "convict parade" being used at political mass meetings throughout the State in the weeks **immediately before** Shushan's trial started. This photograph is reproduced at page 933 of the transcript. It shows a truck carrying a line-up of "convicts" in striped suits, behind the bars, including several men already under conviction in the same federal court. "Shushan" is the third figure from the left, wearing a placard bearing the name of this defendant on his chest, partly concealed in the photograph by the bars of the cage. Next to "Shushan" is standing an already convicted man, "Weiss". The infer-

ence throughout these "convict parades" and "convict cartoons", all paraphernalia of the current political campaign, was unmistakebly a pre-judgment of Shushan's case to the general public, from which the jurors to try him had to come.

The argument on the demurrers, etc., on November 22nd, lasted until late in the day. The next day was a holiday, Thanksgiving Day. On the morning of Friday, November 24th, the defendants and their lawyers returned to court expecting to receive decisions by the court on the various matters pending, but Judge Borah asked for further argument on the demurrers and these arguments lasted all day Friday. On Saturday, November 25th, 1939, all preliminary matters were decided by Judge Borah, except the prayers for contempt actions against the newspapers. He was silent on these, but he refused any continuance, and defendants were ordered to be in court for arraignment on Tuesday, November 28th, 1939.

On this date the defendants were arraigned and pleaded not guilty to the indictment. On this occasion we again asked the court to rule on the petitions for contempt theretofore filed herein and the court entered an order at the request of counsel for the defendants that a bill of exceptions should be reserved in favor of all defendants on the failure of the court to act before the date of the trial on the petition for contempt proceedings against the newspaper publishing companies (see Transcript page 332, Transcript, page 938).

The case was then called for trial on Monday, December 4th, 1939. When this day arrived, counsel for Shushan had been struggling for exactly four weeks to obtain the protection of the court against the barrage of prejudicial newspaper publicity.

If the trial judge had any delusions that Mr. Rogge and the newspapers were going to treat the matter any more fairly while it was actually on trial than they had done prior to the trial, he was speedily undeceived. Within the first three days of the trial two newspapers, the New Orleans Item and the Item-Tribune published articles and headlines so palpably false and prejudicial to Shushan, that their publishers and reporters were then cited for contempt.

These actions for contempt were filed by the United States Attorney, Mr. Viosca, on December 12th, 1939. There were two proceedings, docket No. 19,855, against the Item Company, Ltd., and J. W. F. Moore, night editor of the Tribune (pages 4360 of the transcript) for the prejudicial matter published in the morning Tribune the day after the trial opened, Tuesday, December 5th, 1939; and docket No. 19,856, against the Item Company, Ltd., and James A. Wobbe, assistant city editor of the Item (page 4392 to 4416 of the transcript) for the prejudicial matter published in the Item the afternoon of Thursday, December 7th, 1939.

The defendants in both proceedings were tried by Judge Borah on December 14th, 1939, eight days before the verdict in the main case, and all were found guilty of contempt of court. The Item Company, Ltd., was fined $100.00 on each of the two cases, and the offending employees, Moore and Wobbe, were each fined $25.00.

These contempt actions came too late to ever afford Shushan a fair trial. As long as the outcome of the political campaign was undecided, and men's passions were worked up over that campaign, Shushan's conviction was merely a means to a more important end in mass public opinion, and any jurors then selected to try him were bound to have been sensible of that influence.

The convictions on December 14th, 1939, of New Orleans newspapers for contempt, are not so improtant because of the specific obstructions of justice on December 5th and December 7th, 1939, which brought them about. Those convictions for contempt are more important to this appeal **because they constitute confirmations of everything which Shushan represented to the Court from November 7th to December 4th, 1939, when he tried to get either a continuance of his case until after election or some protection from the prejudicial publicity which had been going on since July.**

It was a gross abuse of the trial Court's discretion and a denial of due process to have refused the comparatively short continuance until the atmosphere would have cleared of the political excitement and partisanship.

It was a grave matter for the trial Court to have an accused ask for protection against such powerful and insidious influences on November 7th, 1939, and then state 15 days afterwards from the bench, in the presence of representatives of the agency complained of:

> **"The Court has not read the petitions as yet."** (Transcript, page 700).

At the same time compelling the defendants to proceed to trial on December 4th, 1939, in the face of repeated complaints that the things complained of were continuing daily.

We seriously doubt if there has ever been a case in the nation where an accused was forced to trial under such aggravated conditions, and where he had taken such timely steps to ask the trial Court for relief, and preserved such a careful record of the injustice done him. While we submit that our appeal on this point is probably without an exact parallel in American jurisprudence, we

can refer to the noteworthy precedent of this Honorable Court in deferring arguments in the celebrated *Dredd Scott* case until after the presidential campaign of 1856 (60 U. S. 393; The Supreme Court of the U. S. in History, Warren, Vol. 3, page 7).

Just as the disturbed conditions in the nation at the time of this presidential campaign during the anti-slavery agitation made it more in keeping with due process to await the hearing of the *Dredd Scott* case until after the election had been held, similarly did the condition of public excitement in Louisiana in December, 1939, necessitate a delay of Shushan's case beyond the primary of January 16th, 1940.

This was particularly true because the conduct of the Assistant Attorney-General himself had put the brand of campaign partisanship on Shushan's case and he had improperly lent a powerful hand to propagandize it as a symbolic case in its effect upon the impending election. The court of appeals said in the opinion below: "The newspapers here sometimes went too far, and the prosecuting attorney ought not to have contributed to what became an abuse." (Tr. Vol. VIII, page 4808).

The case at bar differs, of course, in its basic facts from *Chambers v. Florida*, 309 U. S. 227, 60 S. Ct. 472, which was argued before your Honors almost to the day that Shushan was being sentenced in New Orleans, but it is identical in its relation to the constitutional principle that any influence which disturbs the tranquil and orderly progress of judicial due process invalidates a conviction for crime. We can find no more appropriate language with which to conclude this brief than a short quotation from the eloquent opinion of Mr. Justice Black:

> "Under our constitutional system, courts stand against any winds that blow as havens of

refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion."

Respectfully submitted,

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